IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.1073 OF 2005

Shri Panchshil @ Sagar Ramchandra Jain Jangale
Resident of Tapovan Society,
D/37, Beturkar Pada, Near Heena
Park, Kalyan (W), Dist.Thane. ...Appellant.

V/s.

1.The State of Maharashtra
2.Mrs.Kalpana Shivaji Jadhav ...Respondents.
Resident of Ashtavinayak Society,
Chawl No.4, Room No.3, Bhagwan Nagar,
Kalyan (W), Dist.Thane.

Shri S.R.Chitnis, Sr.Counsel with Shri D.C.Mishra for the Appellant.

Mrs.M.M.Deshmukh, the learned APP Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 25th January, 2007.

ORAL JUDGMENT :

1. The accused/appellant was convicted for the offence punishable under Section 376 of the Indian Penal Code and was sentenced to undergo R.I. for 7 years and to pay a fine of Rs.2,000/- and in default to pay fine, to undergo S.I. for six months by the IInd Ad-hoc Additional Sessions Judge, Kalyan in Sessions Case No.27 of 2005. The accused was also convicted and sentenced for the offence punishable under Sections 342 and 506 of the Indian Penal Code but no separate sentence was awarded. By this appeal, the appellant/accused has

challenged his conviction and sentence.

2. The prosecution case in brief is that the prosecutrix who is P.W.1 and her husband P.W.2 Shivaji used to reside in Ashtavinayak Chawl near Bhagwan Nagar, Kalyan (W), District-Thane. Shivaji used to purchase raw-material and the husband and wife both used to prepare handkerchiefs and would sell in the market. The accused was on visiting terms with the prosecutrix as prior to this incident both were co-workers with Radha Caterers. On 10-8-2004 in the afternoon, Shivaji left his house for purchasing raw-materials for handkerchiefs. Thereafter, the prosecutrix was alone in the house alongwith her son aged about 3-1/2 years. At about 3.00 a.m., the accused had been to the house of the prosecutrix and asked her for a glass of water. The prosecutrix went inside the kitchen for bringing water for him. In the meanwhile, the accused closed the door of the house from inside. When the prosecutrix brought water for him, he caught her hand and inserted handkerchief in her mouth and pushed her inside the kitchen and fell her down. He also threatened to kill her son if she shouted. After that the accused removed his clothes and lifted her maxi upwards and committed forcible intercourse with her. At about the same time door of the house was knocked. When the door was opened

by the prosecutrix, she found her husband Shivaji present there. The accused had concealed himself under the ota or platform of the kitchen. Shivaji caught him. While the prosecutrix was narrating the incident to his husband, the accused fled away leaving his underwear in the house itself. The prosecutrix narrated the whole incident to her husband. Thereafter, both of them went to P.W.3-Kamal, who is the mother of prosecutrix, and narrated the story to her. Thereafter, they went to the house of the accused but he was not found there and then she lodged a report of this incident at the police station at about 6.30 p.m. On her report, the offence was registered as Crime No.315 of 2004 under Section 376, 342 and 506 of the Indian Penal Code at Mahatma Phule Chowk Police Station. During the investigation, spot panchanama was prepared. Parkar (Petticoat) and maxi of the prosecutrix were seized. Underwear of the accused, which was left on the spot, was also seized. Under a panchanama, clothes of the accused were also seized from him. Entire muddemal property was sent to C.A. Statements of the witnesses were recorded. Both were sent for medical examination. After investigation, charge-sheet was filed and in due course, the case was committed to the Court of Sessions for trial.

3. Charge was framed against the accused for the

offences punishable under Sections 376, 342 and 506 of the Indian Penal Code and he pleaded not guilty. He denied the prosecution case in toto. According to him, he had advanced hand-loan of Rs.2,000/- to the prosecutrix, out of which she had refunded only an amount of Rs.1,000/-. He had been to her house to demand the balance amount of Rs.1,000/- but she declined to pay remaining amount and lodged false report against him. On behalf of the prosecution, prosecutrix- P.W.1, her husband P.W.2-Shivaji and mother of prosecutrix P.W.3-Kamal and the Investigation Officer, P.W.4-Police Inspector Mahadu Bhikaji Patil were examined. Several documents were placed on record pertaining to seizure of clothes, medical examinations and C.A.Reports. Those documents were admitted on behalf of the accused in response to the notice under Section 294 of the Cr.P.C. The learned Trial Court did not accept the plea of the accused and relying on the testimony of the prosecutrix and other witnesses, convicted and sentenced the accused as stated earlier.

4. Heard Mr.Chitnis, the learned Senior Counsel for the accused/appellant and Mrs.Deshmukh, the learned APP for the State. Perused the record and proceeding.

5. Mr.Chitnis vehemently contended that though the

accused had not specifically stated in his statement under Section 313 of the Cr.P.C. nor he had given any evidence in defence to establish that the prosecutrix was the consenting party, there is sufficient material in the form of admission and circumstances which would go to show that the prosecutrix was a consenting party for the sexual intercourse.

6. The learned APP vehemently contended that some admissions here and there are not sufficient to come to a conclusion that the prosecutrix was a consenting party and there is no justification to dis-believe the prosecutrix about the offence of rape on her. It is contended that she is a married woman coming from respectable family and she is not expected to make a false charge involving her own honour and respect and therefore, defence story is liable to be rejected.

7. The prosecution evidence will have to be scrutinised minutely and also in the light of above referred arguments by the defence.

8. There is no dispute that the prosecutrix and her husband Shivaji and their minor son aged about 3-1/2 years used to live in a room in the chawl. There is no dispute that they were number of families living in

the said chawl. House of the prosecutrix was having an area of 25’ X 10 ft., inclusive of a kitchen. The kitchen had a platform and an open space of about 6 X 6.5 ft. That kitchen was a spot of incident, where the prosecutrix was allegedly raped. Admittedly, about 6 years prior to this incident, the prosecutrix and the accused used to work with Radha Caterers. They being co-workers were acquainted with each other. She admitted that when she was living at her mother’s house alongwith her husband, the accused used to pay visits to her mother’s house. It is also admitted by the prosecutrix and her husband that they used to make handkerchiefs. Her husband used to go to purchase the raw-material from the market. According to her admission in cross-examination, her husband used to return within 2-3 hours when he would go to fetch raw-material. On that day, as per the evidence of her husband P.W.2 Shivaji, he had left the house at 2.00 p.m. and returned at 3.00 p.m. and as per information given to him by his wife, the accused had entered the house at about 2.30 p.m. She deposed that initially the accused asked for a glass of water to drink. She went inside the kitchen and in the meanwhile, the accused closed the door of the house. When she offered him a glass of water, the accused caught hold her hands and took her to a kitchen. According to her, the accused

gagged her mouth by inserting handkerchief and also threatened to kill her and her son if she shouted. After that he committed sexual intercourse with her. She also deposed that she had tried to resist. Within 4-5 minutes, door was knocked and she opened the door. According to her, when her husband entered the house, accused concealed himself under kitchen ota or a platform. When she was narrating the incident to her husband, the accused put on his pant and went away with his shirt in his hands. He left his underwear in the house itself and went away.

9. Certain facts and admissions are relevant for proper appreciation of the evidence of the prosecutrix. As per her evidence, normally her husband used to take about 2-3 hours to come back whenever he used to go to the market for purchasing raw-materials. However, on that day, as per the evidence of her husband, he had come back within one hour. He left his house at 2.00 p.m. and came back at 3.00 p.m. Her husband, P.W.2 Shivaji deposed that when he came back at 3.00 p.m., door of the house was closed from inside. He knocked the door but the door was not opened immediately, therefore, he knocked it loudly, due to which people gathered there. According to him, his wife took two or three minutes to open the door after it was knocked. In

the meanwhile, people had gathered there. When Shivaji entered in the house, he saw the accused concealing himself under kitchen ota. It is admitted by the prosecutrix that she was acquainted with the accused for long time as they were working together with Radha Caterers. On that day also he came to her house and initially he sat down and they had some talk. After that this incident occurred. She deposed that when she opened the door after it was knocked, she was not aware who was knocking the door and she admitted that she was much more frightened upon seeing her husband. It is difficult to understand why she should be frightened upon seeing her husband unless her hands were also not clean. It was suggested to her that there was love affair between herself and the accused and she got frightened because her affair with the accused was known to her husband. It was suggested to her that after she got herself made up, she opened the door. As per the evidence on record, after arrival of her husband, she narrated the incident to him. In the meanwhile, the accused ran away. According to her, the accused also took bite of her husband and scuffle had taken place and then he ran away. She admitted that hearing the shouts and scuffle, people had gathered there. She also admitted that the accused himself did not try to run away after the door was knocked. The evidence on record

shows that after the door was knocked and then loudly knocked by her husband, she took about 2-3 minutes to open the door. In her F.I.R., Exhibit 6, she had stated that after the door was knocked, the accused got up and she also got up. She put on her nicker and after that she pushed her maxi down and then she went to open the door. During that period, the accused had concealed himself under the kitchen ota. Evidence of her husband shows that when he entered the house, he saw that the accused had concealed himself under the kitchen ota. He caught him and brought him out. In a hurry to run away, the accused left his underwear at the spot. The spot panchanama reveals that his underwear was found on the spot and was seized. This document was admitted on behalf of the accused. This fact corroborates the prosecution story that the accused had sexual intercourse with the prosecutrix.

10. The prosecutrix and her husband admitted that after the incident, both had been to the house of her mother, P.W.3 Kamal. As per the admission of Kamal in cross-examination, prosecutrix and her husband were quarrelling with each other when they came to her house. Though P.W.2 Shivaji did not admit, prosecutrix and her mother, both, admitted that they had been to the house of the accused after the incident but the accused was

not present there. They waited for him for some time. According to the prosecutrix as the accused was not there, they had become angry. She also admitted that they had been to the house of the accused to settle the matter and as he was not available at his house they got angry and thereafter, they went to police station and lodged the report.

11. Admittedly, the prosecutrix and the accused both were medically examined but no injuries were found on her body or on her private part. Exhibit 19 is the medical certificate of the prosecutrix, which shows that there was no evidence of any abrasion, laceration, contusion, nail marks or teeth marks all over the body and particularly, on both the breasts, buttocks, external genital areas, outer thighs, inner thighs, labia majora, labia minora or anal region. No bleeding or any other injury was found on the private part and that was not even expected because she was grown up married lady aged about 23 years, having a child. It is material to note that no injury was found even on the person of the accused, as per the medical certificate Exhibit 9. The absence of any injury on the person of the accused as well as the prosecutrix reveals that there was no resistance from her. It is not that she was a minor or small girl who could not resist the

forcible attack by the accused. She was grown up and experienced woman aged about 23 years. Therefore, she was expected to offer resistance when the accused tried to assault and commit rape on her. It appears that she did not offer any resistance though in the cross-examination she tried to state that she had resisted. If there would be some resistance in the real sense, either she herself or the accused must have suffered some injuries on their bodies.

12. It was put to her that she had not shouted when the accused tried to assault her but she denied this. Admittedly, she was living in a chawl where a large number of people are living. As per the habit of the people living in chawls, if they hear any quarrel, sound or shouts, they would gather immediately and infact, her husband admitted that people gathered there after hearing the shouts on his arrival. If the prosecutrix would have shouted, some people from the nearby houses in the chawl would have gathered there but nobody came there till her husband had knocked the door loudly and till some scuffle had taken place. It indicates that she must not have shouted for help when the accused allegedly assaulted and tried to commit rape on her.

13. According to her, the accused had gagged her

mouth by inserting a handkerchief. If it was so, the said handkerchief in crumpled condition must have been found on the spot but the spot panchanama does not reveal that any such handkerchief in crumpled condition was found there. Spot panchanama Exhibit 14 reveals that only 3 articles, being underwear of the accused, one parkar or petticoat and one gown were lying near sewing machine in the kitchen and these, articles were seized under the spot panchanama. Absence of any such handkerchief on the spot, agitates against her version that her mouth was gagged with the handkerchief.

14. As noted above after the incident, the accused was found hiding himself under kitchen ota. Possibly when the door was knocked, he was not knowing that the husband of the prosecutrix had come and therefore, he was hiding there. This indicates some consent of the prosecutrix. After the husband came in, he immediately ran away even leaving his underwear on the spot. Admission of the prosecutrix that she was much more frightened upon seeing her husband speaks a volume about herself. If the accused had committed rape on her and her husband came there, there was no reason for her to get frightened on seeing her husband. On the contrary, she would rush to her husband for protection and narrate the incident so that the culprit could be punished. As

per the admission of her mother Kamal when the prosecutrix and her husband went to her house, they were quarrelling with each other. If really the accused had committed rape against her willingness or consent and if she was real victim, there could be no reason for quarrel between herself and her husband. It is also difficult to understand why after the incident, the prosecutrix, her husband and her mother went to the house of the accused. According to her own admission, they went to him to settle the matter. If the accused had committed heinous crime of rape on her, there was no reason for them to go to his house and settle the matter. On the contrary they would immediately rush to the police station to lodge a report. The fact that they went to the house of the accused to settle the matter indicates that there was something, which she is not willing to depose before the Court. It may be noted that no semen or no semen stains were found on the clothes of the prosecutrix or on her vaginal swab nor any semen or semen stains were found on the pubic hairs of the accused as per the C.A.Reports. However, during the medical examination of the accused, smegma was not found as per the medical certificate Exhibit 18. Though it does not establish that he had committed rape, it indicates that he might have sexual intercourse recently. Taking into consideration the circumstances

noted above, the conduct of the prosecutrix does not inspire confidence.

15. It is now well settled that in the case of rape, the conviction can be based on the sole testimony of the prosecutrix if her testimony is found trustworthy and reliable and there are no circumstances which would cause doubt on her veracity. In **Sudhansu Sekhar Sahoo v. The State of Orissa 2003 Supreme Court Cases (Cri) 1484,** the Supreme Court observed as follows in paragraph 11 and 18:

> "It is true that the sole testimony of the victim of a sexual offence can be a basis for conviction provided it is safe, reliable and worthy of acceptance. This Court had occasion, in many cases, to consider the nature of evidence required when the conviction was mainly based on the testimony of the victim of a sexual offence.
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> It is well settled that in rape cases the conviction can be solely based on the evidence of the victim, provided such evidence inspires confidence in the mind of the court. The victim is not treated as an accomplice, but could only be characterised as injured witness. It is also reasonable to assume that no woman would falsely implicate a person in a sexual offence as the honour and prestige of that woman also would be at stake. However, the evidence of the prosecution shall be cogent and convincing and if they is any supporting material likely to be available, then the rule of prudence requires that evidence of the victim may be supported by such corroborative material."

In **Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and another 2003 Criminal Law Journal 910,** the Supreme Court observed as follows in paragraph 21:

> "On an overall appreciation of the evidence of the prosecutrix and her conduct we have come to the conclusion that P.W.1 is not a reliable witness. We, therefore, concur with the view of the High Court that a conviction cannot be safely based upon the evidence of the prosecutrix alone. It is no doubt true that in law the conviction of an accused on the basis of the testimony of the prosecutrix alone is permissible, but that is in a case where the evidence of the prosecutrix inspires confidence and appears to be natural and truthful. The evidence of the prosecutrix in this case is not of such quality, and there is no other evidence on record which may even lend some assurance, short of corroboration that she is making a truthful statement...."

In **Ramdas & Ors. v. State of Maharashtra AIR 2007 Supreme Court 155,** the Supreme Court observed as follows in paragraph 22:

> "It is no doubt true that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity. If the evidence of the prosecutrix is of such quality that may be sufficient to sustain an order of conviction solely on the basis of her testimony. In the instant case we do not find her evidence to be of such quality.

16. In view of the legal position settled in large number of cases, it is now well settled that conviction in the case of rape can be based solely on the testimony of the prosecutrix provided the Court is convinced about the truthfulness of the prosecutrix and there are no circumstances to doubt or suspect her own conduct and veracity. If her evidence is truthful and of such quality, then only conviction can be based on her testimony alone. In the present case as pointed out above, evidence of the prosecutrix is not of such quality which will inspire confidence nor there is any other evidence which would lead some assurance that her evidence is truthful. It is clear that she was well acquainted with the accused for a number of years. He was on visiting terms even when she was living with her husband at the house of her mother. It appears that whenever her husband used to go to purchase raw-material, he would return within 2-3 hours. It appears that on that day shortly after her husband left the house, accused came there. Firstly, he sat down, thereafter he had a talk with the prosecutrix and thereafter, he demanded water and after that sexual intercourse took place. She did not make any attempt to shout or to resist. After the door was knocked, she took about 2-3 minutes to open the door and on seeing her husband, she got very much frightened. In the

meanwhile, the accused had concealed himself under the kitchen ota. Not only this after the accused had ran away there was some quarrel between the husband and wife and later on both of them alongwith her mother went to the house of the accused to settle the matter but they got annoyed as the accused was not found there. No injury was found on the person of the prosecutrix or the accused which indicates that there was resistance on her part. All these circumstances create suspicion about her own conduct and her consent can not be totally ruled out. In these circumstances, I find it difficult to sustain the conviction of the accused on the sole testimony of the prosecutrix. Possibility can not be ruled out that she shouted only after she found that she was caught by her husband in the house with the accused.

17. Taking into consideration all the circumstances noted above, I find that the learned Trial Court committed error in convicting the accused on the sole testimony of the prosecutrix. Taking into consideration all the circumstances, atleast benefit of doubt can be given to the accused. Therefore, the impugned judgment and order of the conviction and sentence are liable to be set aside.

18. In the result, appeal is allowed. The impugned

order of conviction and sentence is hereby set aside. Accused is hereby acquitted. He be released forthwith if not required in any other case.

(J.H.Bhatia,J.)